

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-TCK-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants)	

**THE STATE OF ARKANSAS' AND THE ARKANSAS
NATURAL RESOURCE COMMISSION'S REPLY BRIEF IN SUPPORT OF THEIR
MOTION TO INTERVENE**

The State of Arkansas and the Arkansas Natural Resources Commission submit this Reply Brief in support of their Motion to Intervene.

I. INTRODUCTION

On May 2, 2006, the State of Arkansas and the Arkansas Natural Resources Commission filed a motion to intervene in this case.¹ The State of Arkansas seeks leave to intervene on behalf of itself and as *parens patriae* for its citizens. The Arkansas Natural Resources

¹ Arkansas' motion to intervene was appropriately accompanied by a "pleading setting forth the claim or defense for which intervention is sought" in the form of a motion to dismiss and brief in support thereof, in accordance with Rule 24(c) of the Federal Rules of Civil Procedure. "Judicial interpretation of this rule [Federal Rule 24 (c)] has been liberal and the courts have held that the proper approach to the rule is to disregard non-prejudicial defects. *Spring Construction Co., Inc. v. Harris*, 614 F.2d 374,377 (4th Cir. 1980) ... The purpose of requiring an intervenor to file a pleading is to place the other parties on notice of the position, claim, and relief sought by the intervenor. ... Accordingly, an adequate pleading to intervene is not necessarily limited to a Rule 7(a) pleading." *WJA Realty Limited Partnership v. Alan Nelson et al.*, 708 F. Supp. 1268, 1271 (S.D. FL 1989); see also *Coalition for Sustainable Resources, Inc. v. United States Forest Service, et al.*, 48 F. Supp 2d 1303 (WY 1999) (Intervenor's motion to dismiss was granted); *Hill v. Kansas Gas Service Co. et al.*, 203 F.R.D. 631 (KS 2001); *Wedgewood Ltd. Partnership v. Township of Liberty, Ohio*, Not Reported in F.Supp.2d, 2005 WL 1211305 (S.D.Ohio). However, should this Court wish the pleading in intervention to be one delineated in Rule 7(a), Arkansas will substitute an answer in intervention for the proposed motion to dismiss, and follow it with a motion for judgment on the Pleadings.

Commission seeks leave to intervene as the regulatory agency that deals with nutrient management issues in Arkansas. In support of their right to intervene, the State of Arkansas and the Arkansas Natural Resources Commission (collectively, "Arkansas") assert that they have an interest relating to the property or transaction which is the subject of the case; they are so situated that the disposition of this case may as a practical matter impair or impede their respective abilities to protect those interests; there is no party currently in this case that can adequately represent Arkansas' interests; and their motion is timely.

In response, the State of Oklahoma does not dispute any of the aforementioned assertions, rather, Oklahoma claims that based upon the Order issued by the United States Supreme Court denying Arkansas' motion for leave to file a bill of complaint regarding the same or similar issues as those being considered herein, this Court has been divested of jurisdiction to hear Arkansas' claims. Oklahoma's position is flatly unsupported by the law. Arkansas has met the burden necessary to establish its right to intervene and its motion should be granted.

II. ARGUMENT

Oklahoma would have this court believe that the United States Supreme Court is the only forum in which Arkansas may bring its claims. Although 28 U.S.C. §1251(a) states that the United States Supreme Court will have "original and exclusive jurisdiction of all controversies between two or more States," it has become apparent that the Supreme Court has been selective when choosing to exercise that jurisdiction. Contrary to the position now espoused by Oklahoma, the Supreme Court has repeatedly stated that the Court's original jurisdiction should be exercised "sparingly," and that the Court will use its discretion when deciding whether to exercise that jurisdiction, even as to actions between States where such jurisdiction is arguably

exclusive. *Maryland v. Louisiana*, 451 U.S. 725, 739, 101 S.Ct. 2114, 2125 (1981); *United States v. Nevada*, 412 U.S. 534, 538, 93 S.Ct. 2763, 2765 (1973).

The Court has interpreted 28 U.S.C. § 1251(a) as providing it with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in the Court for particular disputes that fall within its constitutional original jurisdiction. *See Maryland v. Louisiana, supra*, 451 U.S. at 743, ; *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 499, 91 S.Ct. 1005, 1010 (1971). The Court has exercised this discretion with an objective of promoting the most effective functioning of the Court within the overall federal system. *Texas v. New Mexico*, 462 U.S. 554, 570, 103 S.Ct. 2558, 2568 (1983). According to the Supreme Court, it has imposed “prudential and equitable limitations” upon the exercise of its original jurisdiction. *California v. Texas*, 457 U.S. 164, 168, 102 S.Ct. 2335, 2337 (1982). In imposing such limitations, the Court has placed great emphasis on the availability of another forum in which the parties’ claims may be heard:

We construe 28 U.S.C. § 1251(a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; **yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had.**”

Illinois v. City of Milwaukee, 406 U.S. 91, 93, 92 S.Ct. 1385, 1387 (1972) (emphasis added).

Recognizing the equitable limitations on the exercise of its discretion to refuse to hear cases that are within its original jurisdiction pursuant to 28 U.S.C. § 1251(a), it cannot be seriously argued that the Court would exercise that discretion without considering the availability of another appropriate forum. Indeed, in cases in which the Court has chosen to exercise its discretion to decline to hear claims or controversies between states, it has emphasized that

exercising such discretion is proper only if the issues are clearly subject to resolution in an alternative forum. *Wyoming v. Oklahoma*, 502 U.S.437, 450, 112 S. Ct. 789, 799 (1992).

In its Response, Oklahoma “speculates” that the Supreme Court denied Arkansas’ motion for leave to file its original complaint because the Court surmised that the claims lacked merit. Such speculation is neither warranted nor supported by the facts, and is inconsistent with other decisions of the Supreme Court holding that a denial is not a comment on the merits of a case. *Schiro v. Indiana*, 493 U.S. 910, 911, 110 S.Ct. 268, 268 (1989).² Oklahoma also speculates that the Court might have concluded that the existing parties in this case could fully and properly litigate the issues raised by Arkansas in its original complaint. But Oklahoma’s speculation is inconsistent with the assertions Oklahoma made in response to the Poultry Defendants’ motions to dismiss: that only Arkansas has standing to raise issues related to the extraterritorial application of Oklahoma state law and issues related to the Arkansas Oklahoma Interstate Compact Commission (“Compact Commission”).

The Supreme Court issued a one sentence Order, in which it denied Arkansas’ motion for leave to file a bill of complaint, with no discussion, analysis or explanation. (See attached exhibit 1) There is by no means any indication that the Supreme Court found that Arkansas’ claims lacked merit. It is much more likely that the Supreme Court determined that there was another suitable forum in which this dispute could be resolved. Furthermore, even if one were to accept Oklahoma’s invitation to speculate, one could equally speculate that the Supreme Court determined that the proper forum is the action pending in this District, or it agreed with Arkansas

² *Schiro* dealt with the denial of a petition for writ of certiorari, however, such reasoning would clearly apply to a denial of the exercise of original jurisdiction. *Schiro* quotes with approval *Maryland v. Baltimore Radio Show, Inc.* 338 U.S. 912, 919, 70 S.Ct. 252,255, 94 L.Ed. 562 (1950): “Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court’s views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.”

that the proper forum for the resolution of this case, as Arkansas has maintained, is the Arkansas-Oklahoma Arkansas River Compact Commission (“Compact Commission”).³ One thing appears certain, however: The Court would not leave Arkansas with no forum in which to pursue its claims.

Oklahoma’s reliance on *Mississippi et al. v. Louisiana et al.*, 506 U.S. 73, 113 S.Ct. 549 (1992) to support its argument that no other available forum exists for Arkansas’ claims is misplaced. *Mississippi v. Louisiana* was originally filed as a boundary dispute between two private parties. Louisiana intervened in the action and filed a third party complaint against Mississippi when it was determined that the boundary of the private land involved was also the vicinity of the state boundary. Louisiana attempted to file an original complaint with the Supreme Court, but the Court declined to exercise its original jurisdiction and the matter proceeded in the District Court. When the Supreme Court heard the matter on appeal, it found that the District Court and the Court of Appeals “intermixed the questions of title to real property and of the location of the state boundary” and concluded that neither had jurisdiction to bind the states in their boundary dispute. *Id.* at 78. The Court did, however, recognize the long standing precedent that its original jurisdiction should be exercised sparingly, and it outlined the factors to be considered when deciding whether to exercise its discretion:

We first exercised this discretion not to accept original actions in cases within our nonexclusive original jurisdiction, such as actions by States against citizens of other States, [citations omitted]. But we have since carried over its exercise to actions between two States, where our jurisdiction is exclusive. See *Arizona v. New Mexico*, supra; *California v. West Virginia*, 454 U.S. 1027, 102 S.Ct. 561, 70 L.Ed.2d 470 (1981); *Texas v. New Mexico*, supra.

³ See, e.g., *Prudential Ins. Co. of America v. National Park Medical Center*, 413 F.3d 897, 903-04 (8th Cir. 2005) (Court of Appeals’ summary denial of motion to recall mandate, without any substantive analysis or comment on the merits of the motion, did not bar district court from subsequently considering merits of underlying substantive claim that injunction should be lifted; “[T]he district court could have reasonably inferred that our denial was not on the merits, but rather an invitation for the parties to present their claims before the district court first.”)

Determining whether a case is “appropriate” for our original jurisdiction involves an examination of two factors. First, we look to “the nature of the interest of the complaining State,” [citations omitted] focusing on the “seriousness and dignity of the claim,” [citations omitted]. ... Second, we explore the availability of an alternative forum in which the issue tendered can be resolved.

Id., at p. 77.

Nor did the Supreme Court leave Louisiana and Mississippi without a forum. In order to address its concerns, Louisiana filed a subsequent motion for leave to file a bill of complaint with the Supreme Court, which was granted on November 1, 1993. *Louisiana v. Mississippi*, 510 U.S. 941, 114 S.Ct. 377 (1993). Soon thereafter, Mississippi’s motion for leave to file a counterclaim in the matter was also granted. *Louisiana v. Mississippi*, 510 U.S. 1036, 114 S.Ct. 676 (1994).

Oklahoma’s extreme position – that no forum exists for Arkansas’ claims to be heard – is completely unsupported by any case law and, if accepted, would result in an inequitable denial of the rights of the State of Arkansas to have its claims heard on behalf of the state, its citizens and its regulatory agency. Upon consideration of the relevant precedent, it is only logical that the denial of Arkansas’ motion for leave to file an original action was based on the Supreme Court’s belief that this Court, or the Compact Commission, are indeed other “forum[s] where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had.” *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972).

III. CONCLUSION

Oklahoma is wrong as a matter of law when it argues that the Supreme Court’s denial of Arkansas’ motion to file its bill of complaint prohibits Arkansas from resorting to an alternative forum in which to present its grievance. Furthermore, Oklahoma has failed to rebut Arkansas’

claim that it meets the requirements for intervention in this case. Arkansas' motion to intervene should be granted.

Respectfully submitted,

s/William B. Federman

William B. Federman, OBA 2853
FEDERMAN & SHERWOOD
120 North Robinson, Suite 2720
Oklahoma City, OK 73102
Telephone: (405) 235-1560
Fax: (405) 239-2112
wfederman@aol.com

MIKE BEEBE
Attorney General

By: Teresa Marks, Ark. Bar No. 84117
Deputy Attorney General
Office of the Attorney General
323 Center Street, Suite 200
Little Rock, Arkansas 72201

Charles Moulton Ark. Bar No. 91105
Senior Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2006, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants (names only are sufficient):

Jo Nan Allen jonanallen@yahoo.com	Tim Keith Baker BAKER & BAKER tbakerlaw@sbcglobal.net
Lloyd E Cole, Jr COLE LAW FIRM colelaw@alltel.net	Angela Diane Cotner ANGELA D COTNER ESQ AngelaCotnerEsq@yahoo.com
Frederick C Baker Elizabeth C Ward William H Narwold MOTLEY RICE LLC fbaker@motleyrice.com lward@motleyrice.com	W A Drew Edmondson John Trevor Hammons Kelly S Hunter Burch Office of the Attorney General (OKC-2300) State of Oklahoma fc_docket@oag.state.ok.us thammons@oag.state.ok.us fc.docket@oag.state.ok.us
Dorothy Sharon Gentry Robert Allen Nance RIGGS ABNEY (OKC) sgentry@riggsabney.com rnance@riggsabney.com	Robert Paul Redemann David Charles Senger Lawrence W Zeringue PERRINE MCGIVERN REDEMANN REID BERRY rredemann@pmrlaw.net dsenger@pmrlaw.net lzingue@pmrlaw.net
Richard T Garren Melvin David Riggs Sharon K Weaver Douglas Allen Wilson RIGGS ABNEY NEAL TURPEN ORBISON & LEWIS rgarren@riggsabney.com driggs@riggsabney.com sweaver@riggsabney.com Doug_Wilson@riggsabney.com	Delmar R Ehrich John F Jeske Bruce Jones Krisann Kleibacker Lee Dara D Mann FAEGRE & BENSON (Minneapolis) dehrich@faegre.com jjeske@faegre.com bjones@faegre.com
Vicki Bronson John R Elrod CONNER & WINTERS PLLC (AR) vbronson@cwlaw.com jelrod@cwlaw.com	Ronnie Jack Freeman Tony Michael Graham William Francis Smith GRAHAM & FREEMAN PLLC jfreeman@grahamfreeman.com tgraham@grahamfreeman.com bsmith@grahamfreeman.com

Bruce Wayne Freeman CONNER & WINTERS (Tulsa) bfreeman@cwlaw.com	Martin Allen Brown MARTIN A BROWN PC mbrown@brownlawpc.com
James Martin Graves Gary V Weeks BASSETT LAW FIRM jgraves@bassettlawfirm.com	Douglas L Boyd dboyd31244@aol.com
John Stephen Neas LOGAN & LOWRY (Vinita) sneas@loganlowry.com	Robert W George KUTAK ROCK LLP (Fayetteville) robert.george@kutakrock.com
Louis Werner Bullock James Randall Miller David Phillip Page MILLER, KEFFER & BULLOCK LBULLOCK@MKBLAW.NET rmiller@mkblaw.net dpage@mkblaw.net	Paula M Buchwald Patrick Michael Ryan Stephen L Jantzen RYAN WHALEY COLDIRON AND SHANDY PC pbuchwald@ryanwhaley.com pryan@ryanwhaley.com sjantzen@ryanwhaley.com
Thomas C Green Jay Thomas Jorgensen Timothy K Webster Mark D Hopson SIDLEY AUSTIN BROWN & WOOD LLP jjorgensen@sidley.com twebster@sidley.com mhopson@sidley.com	Theresa Noble Hill Colin Hampton Tucker John H Tucker RHODES HIERONYMUS JONES TUCKER & GABLE thillcourts@rhodesokla.com chtucker@rhodesokla.com jtuckercourts@rhodesokla.com
Thomas James Grever LATHROP & GAGE (Kansas City) tgrever@lathropgage.com	Jennifer Stockton Griffin LATHROP & GAGE LC jgriffin@lathropgage.com
Michael Todd Hembree HEMBREE AND HEMBREE hembree1@aol.com	Raymond Thomas Lay KERR IRVINE RHODES & ABLES rtl@kiralaw.com
Dale Kenyon Williams, Jr HALL ESTILL HARDWICK GABLE GOLDEN & NELSON (Tulsa) kwilliams@hallestill.com	J Ron Wright WRIGHT STOUT FITE & WILBURN ron@wsfw-ok.com

Linda C Martin DOERNER SAUNDERS DANIEL & ANDERSON (Tulsa) lmartin@dsda.com	Robert Park Medearis, Jr MEDEARIS LAW FIRM PLLC medearislawfirm@sbcglobal.net
George W Owens Randall Eugene Rose OWENS LAW FIRM PC (Tulsa) gwo@owenslawfirm.com rer@owenslawfirm.com	Marcus N Ratcliff Kenneth Edward Wagner LATHAM STALL WAGNER STEELE & LEHMAN PC mratcliff@lswsl.com kwagner@lswsl.com
David Alden Walls MCKINNEY & STRINGER PC (OKC) wallsd@wwhlaw.com	R Pope Van Cleef, Jr ROBERTSON & WILLIAMS popevan@robertsonwilliams.com
Robert E Sanders Edwin Stephen Williams Edwin Stephen Williams YOUNG WILLIAMS P.A. rsanders@youngwilliams.com steve.williams@youngwilliams.com steve.williams@youngwilliams.com	Philip D Hixon Nicole Marie Longwell Archer Scott McDaniel Chris A Paul JOYCE PAUL & MCDANIEL PC Phixon@jpm-law.com Nlongwell@jpm-law.com Smcdaniel@jpm-law.com cpaul@jpm-law.com
Adam Scott Weintraub ADAM SCOTT WEINTRAUB PC adlaw@msn.com	Terry Wayen West WEST LAW FIRM terry@thewestlawfirm.com
John B. DesBarres WILSON, CAIN & ACQUAVIVA johnd@wcalaw.com	

with filed document(s) being mailed to the following non-ECF registered parties to this action:

Jim Bagby RR 2, Box 1711 Westville, OK 74965	Gordon and Susann Clinton 23605 S. Goodnight Lane Welling, OK 74471
Eugene Dill P. O. Box 46 Cookson, OK 74424	Marjorie Garman 5116 Highway 10 Tahlequah, OK 74464

James C. Geiger Route 1, Box 222 Kansas, OK 74347	Thomas C. Green SIDLEY, AUSTIN BROWN & WOOD, LLP 1501 "K" St., NW Washington, DC 20005
G. Craig Heffington 20144 W. Sixshooter Road Cookson, OK 74427	John and Virginia Adair Family Trust Route 2, Box 1160 Stilwell, OK 74960
James and Dorothy Lamb Route 1, Box 253 Gore, OK 74435	Krisann Kleibacker Lee Dara D. Mann FAEGRE & BENSON 90 S. 7 th St., Suite 2200 Minneapolis, MN 55402-3901
Doris Mares P. O. Box 46 Cookson, OK 74424	William H. Narwold MOTLEY RICE, LLC 20 Church St., 17 th Floor Hartford, CT 06103
Richard and Donna Parker 34996 S. 502 Road Park Hill, OK 74451	Monte W. Strout 209 W. Keetoowah Tahlequah, OK 74464
C. Miles Tolbert Secretary of the Environment State of Oklahoma 3800 North Classen Blvd. Oklahoma City, OK 73118	Robin L. Wofford Route 2, Box 370 Watts, OK 74964
Monte W Strout 209 W Keetoowah Tahlequah, OK 74464 918-456-1353	

s/William B. Federman
William B. Federman